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No. 86-720

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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

LOOART PRESS, INC.,
Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal First Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Looart Press, Inc., the petitioner in this matter, sold various stationery items to California residents through the mails. These items were marketed under the brand name "Current, Inc." Looart Press also sold greeting cards at wholesale under the "Looart" name. With respect to this second product line, Looart Press was represented in the state by a California corporation which actively solicited orders on its behalf and filled those orders from an inventory of goods maintained in California. Receipts from such wholesale orders totaled more than $750,000 during the three-and-a-half year period involved. The question presented is:

Did the activities carried on by Looart Press within the State of California establish a nexus sufficient to require Looart Press to collect use taxes on the "Current" products which it sold through the mails?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion rendered in this case by the California Court of Appeal, First Appellate District. The unpublished opinion is reproduced at pages A3-A8 of the Appendix to the petition for review.[1]

RELEVANT STATUTES OMITTED FROM PETITION

This case involves several provisions of the California Revenue and Taxation Code which have not been set forth in the petition

[1] Petitioner has not included in its Appendix a copy of an order of modification issued by the Court of Appeal on April 23, 1986. The order is appended to this brief in opposition.

for review. These provisions are quoted in full or relevant part below.[2]

§ *6201. Imposition and rate of tax:*

"An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state. . . . "

§ *6203. Collection of tax by retailer: Receipt to purchaser: Retailer engaged in business in this State:*

"Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall, at the time of making the sales or, if the storage, use, or other consumption of tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

* * *

" 'Retailer engaged in business in this state' as used in this and the preceding section means and includes any of the following:

"(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(b) Any retailer having any representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

" * * * * "

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[2] All of the statutes listed are located in Deering's Annotated California Codes.

§ 6204. Tax as debt to state: Nature of Tax:

"The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state."

REASONS WHY THE WRIT SHOULD BE DENIED

THE COURT OF APPEAL'S HOLDING WITH RESPECT TO THE ADEQUACY OF NEXUS FULLY ACCORDS WITH ESTABLISHED PRINCIPLES AND THUS DOES NOT PRESENT AN IMPORTANT QUESTION OF LAW WHICH NEEDS TO BE RESOLVED BY THIS COURT.

A. Introduction

The assessment which is challenged in this action was issued against Looart Press, Inc. ("LPI") for uncollected use taxes due on stationery items which LPI sold by mail to California residents under the brand name "Current, Inc." LPI also sold greeting cards at wholesale under the "Looart" name to retail outlets in California. Orders for these sales were solicited within the state by LPI's local representative, Christmas Publishers Group ("CPG"), which filled the orders from an inventory of "Looart" products maintained at its California facility. LPI's principal claim is that the lack of a relationship between its in-state activities and its mail order sales precludes California from requiring LPI to collect use taxes on the "Current" items sold by mail.

In *National Geographic* v. *Cal. Equalization Board,* 430 U.S. 551 (1977), this Court held that the use tax collection duty may be imposed on an out-of-state seller even though his activity within the taxing state is unrelated to the sales giving rise to the tax liability. 430 U.S., at 560-561. The out-of-state retailer in that case contended, as does LPI, that "there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the

seller's activity within the State." *Id.*, at 560. This Court flatly disagreed with that contention, holding:

> ". . . However fatal to a direct tax a 'showing that particular transactions are dissociated from the local business . . . ,' [citations omitted], such dissociation does not bar the imposition of the use-tax-collection duty.
>
> * * *
>
> ". . . the relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activity carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax.' " *Id.*, at 560-561 (second brackets and emphasis in original).

This Court, in short, already has ruled definitively on the very issue which is at the heart of this controversy.

LPI's inability to cope with the ruling in *National Geographic* is underscored by the fact that it never mentions that ruling in its petition for review.[3] Instead, LPI has focused on what it apparently perceives to be the essential point of the case: that an out-of-state vendor may not be required to collect use taxes in the absence of a "substantial" connection between the vendor and the taxing state. LPI then proceeds to equate a "substantial" connection (i.e., an adequate nexus) with the existence of some tangible relationship between the in-state activities of the seller and the transactions on which the asserted liability is based. See Petition for Writ of Certiorari (hereinafter "Pet."), at 19-24. Thus, it has simply stated in different terms precisely the same notion that was rejected by this Court in the *National Geographic* decision.

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[3] LPI also maintained a "pregnant silence" in the lower courts. During the course of the state litigation, LPI filed three briefs and two petitions totaling some 170 pages. The sole mention of the Court's pronouncement in *National Geographic* consisted of a footnote in one brief which obliquely referred to the ruling as dictum.

Two other matters require preliminary comment. The first is the nature of the liability asserted against LPI. Contrary to its suggestion, LPI has not been subjected to a tax on its interstate sales of "Current" products. Nor has it been subjected to a direct use tax liability in connection with those sales. The use tax is imposed on the in-state use or other consumption of tangible personal property purchased from a retailer in a transaction not subject to sales tax and is a direct obligation of the purchaser. Cal. Rev. & Tax. Code §§ 6401, 6202. Although the tax must be collected by any retailer "engaged in business in this state" (Cal. Rev. & Tax. Code § 6203), and such a retailer becomes indebted to the state for the amount of the tax if he fails to collect it (Cal. Rev. & Tax. Code § 6204), the retailer is held responsible not as a taxpayer, but as a tax collector.

The distinction between a direct tax and the use tax collection duty is not, of course, merely academic. While this Court observed in *Miller Bros.* v. *Maryland,* 347 U.S. 340, 344 (1953) that the "economic consequence" is identical in the two situations, it has recognized that the legal consequences are not identical. A direct tax has been held permissible only when it is related to the activities carried on within the taxing state; the same relationship has not been required where a foreign corporation is asked to collect a tax from a third party. This distinction was clearly drawn in *National Geographic,* where this Court said that "However fatal to a direct tax a 'showing that particular transactions are dissociated from the local business . . . ,' [citations omitted], such dissociation does not bar the imposition of the use-tax-collection duty." 430 U.S., at 560. Citing various cases in which it has upheld direct taxes against a foreign corporation enjoying the services of the taxing state, the Court further commented:

> "The case for the validity of the imposition upon the out-of-state seller enjoying such services of a duty to collect a use tax is even stronger. See *Norton Co.* v. *Illinois Rev. Dept.,* 340 U.S. 534, 537 (1951). The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing state is self-evident. The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the sole

> burden imposed upon the out-of-state seller by statutes like [Cal. Rev. & Tax. Code] §§ 6203 and 6204 is the administrative one of collecting it." *Id.*, at 558.

LPI's repetitious use of the term "taxing nexus" is therefore not only imprecise but misleading. There can be no question that use taxes were due on the use of "Current" merchandise which California residents purchased from LPI for use in California. That liability existed irrespective of any responsibility which LPI may have had for collecting the taxes; in other words, a "taxing nexus" existed by virtue of the use of the goods in California regardless of the presence or absence of a nexus between California and LPI. Consequently, the question here is not whether there was a "taxing nexus" between the State of California and LPI, but whether the nexus between the State of California and LPI was sufficient to require LPI to collect applicable use taxes from its California customers.

Secondly, LPI has tended to obscure the constitutional issue in the case by constantly referring to its "Looart" and "Current" divisions as though they were two separate entities. See, e.g., Pet., at 6 ("The products of *the two companies* were directed to entirely different markets"); *Id.*, at 7 ("The internal operations of *the two companies* were also entirely separate and independent"); *Id.* at 8 ("The products of *each company* bore only the name of *that company*"). (Emphasis added.) The fact of the matter is that both the "Current" and "Looart" product lines were designed, manufactured and sold by a single corporate entity, LPI. Current, Inc. ceased to exist some five years before the tax period involved. LPI cannot resurrect its former identity simply by the use of deceptive terminology or by characterizing the merger of Current, Inc. into LPI as merely "formalistic." See Pet., at 5, 27.

B. The Court of Appeal applied the proper constitutional standard in determining the adequacy of nexus

The constitutional test for determining the adequacy of nexus for use tax collection purposes is whether there is "some definite link, some minimum connection" between the taxing state and the person the state seeks to make a tax collector. *National Geographic.* v. *Cal. Equalization Board, supra,* 430 U.S., at 560-

561. In turn, the existence of such a connection has depended on whether the out-of-state seller has had a physical presence within the taxing state. See, e.g., *Nat. Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753, 758. A seller who has a physical presence within the taxing state clearly receives benefits, protections and services for which the state is entitled to ask some return.

Accordingly, this Court has ruled against the use tax collection requirement where the only contacts with the state have consisted of occasional local deliveries by the vendor and/or indirect solicitation through advertising, direct mail circulars, or the like. See *Miller Bros.* v. *Maryland, supra; Nat. Bellas Hess* v. *Dept. of Revenue, supra.* On the other hand, the Court has upheld the collection requirement where the vendor has maintained a place of business within the taxing state. See *Felt & Tarrant Co.* v. *Gallagher,* 306 U.S. 62 (1939); *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359 (1941); *Nelson* v. *Montgomery Ward & Co.,* 312 U.S. 373 (1941); *National Geographic* v. *Cal. Equalization Board, supra.* It has also upheld the requirement where the vendor has had no local place of business but has solicited orders for its products in the taxing state either through its own salesmen or independent contractors. *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335 (1944); *Scripto* v. *Carson,* 362 U.S. 207 (1960).

The activities of LPI within the State of California indisputably fall within the latter category. LPI nevertheless insists that the Court of Appeal, in holding that the activities of LPI's representative in California were sufficient to establish the requisite nexus, applied an improper constitutional standard. In particular, LPI argues that "Contrary to the holding of the California Court of Appeal, the 'mere presence' of a taxpayer in the taxing state, in and of itself, is clearly not sufficient to justify the imposition of a use tax." Pet., at 11 (emphasis deleted). Although the Court of Appeal did not in fact hold that the "mere presence" of a retailer within the taxing state is sufficient (or even use the term "mere presence" in its opinion), LPI goes on to assert that, in so holding, the Court of Appeal has resurrected the "slightest presence" test disapproved by this Court in *National Geographic.* That case, according to LPI, stands for the proposition that the requisite nexus "must be based upon some substantial connection

with the taxing state; a mere physical presence will not [suffice]." *Id.* at 10 (emphasis deleted).[4]

LPI does not define the terms that it bandies about. If it means by the above statements that a "slight" physical presence has been deemed insufficient, it is correct. See, e.g., *Miller Bros.* v. *Maryland, supra;* compare, however, *Good's Furniture* v. *Iowa State Bd. of Tax.*, 382 N.W. 2d 145 (Iowa 1986), cert. den., ____ U.S. ____ (1986) (No. 85-1885). If, on the other hand, LPI means that something *in addition to* physical presence of the out-of-state vendor within the taxing state is required, it is wrong; the decision in *National Geographic* held just the opposite.

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[4] In affirming the judgment of the California Supreme Court in *National Geographic,* this Court indicated disagreement with the semantics which had been used by the California court. That court had stated that "the slightest presence within [the taxing] state independent of any connection through interstate commerce" would suffice for use tax collection purposes. 16 Cal. 3d, at 644, 547 P. 2d, at 462. This Court said that the activities of the out-of-state retailer within the State of California established "a much more substantial presence than the expression 'slightest presence' connotes," and it cautioned that its affirmance of the judgment was not to be understood "as implying agreement with [the California] court's 'slightest presence' standard of constitutional nexus." 430 U.S., at 556. Contrary to what LPI implies, however, the Court did not state that a "substantial connection" as opposed to a "slightest presence" is required. Instead, it reiterated that the relevant constitutional test is whether there is "some definite link, some minimum connection" between the taxing state and the foreign corporation. *Id.*, at 560-561.

LPI also says that in *Miller Bros.* v. *Maryland, supra,* "[i]t was expressly noted that something 'more substantial than mere presence' must be established for the state to have an adequate basis for taxation." Pet., at 12 (emphasis deleted). It is to be noted that the language quoted by LPI did not specifically relate to the use tax collection duty but appeared in a general discussion of jurisdiction to tax, part of which read: "Thus, the Court has frequently held that domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income, property, and death taxes." 347 U.S., at 345 (footnotes omitted).

The Court of Appeal's finding of adequate nexus in the present case fully accords with these principles. That court did not insinuate, much less hold, that the "slightest" presence of an out-of-state vendor will suffice for nexus purposes—i.e., that sufficient nexus will exist when there is "any connection between the state and the taxpayer, no matter how tenuous . . . " Pet., at 15. Rather, the Court of Appeal concluded, in line with prevailing authority, that the requisite nexus was established by the activities of LPI's representative admittedly carried on within the State of California. Appendix, A6-A7.

Similarly, the Court of Appeal has not "repudiated" the decision in *Nat. Bellas Hess* v. *Dept. of Revenue, supra.* In that case, it was held that the use tax collection duty could not be imposed on an out-of-state seller whose only contacts with the taxing state were through means of interstate commerce. LPI asserts that an equivalent situation is presented here since "Current did no more than communicate with its customers in [California] by mail or common carrier." Pet., at 14. The problem with this argument, of course, is that the retailer of the "Current" products was LPI, whose contacts with the State of California were *not* made solely through interstate commerce. Accordingly, the decision in *Nat. Bellas Hess* is inapplicable.[5]

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[5] LPI also has misrepresented the decision in *Nat. Bellas Hess.* It states:

> ". . . This Court noted that *National Bellas Hess* used Illinois banking and credit facilities to carry on its business in Illinois because (unlike plaintiff in the case at bar) a substantial portion of its mail order sales was on credit. However, the majority found such contacts to be *too indirect and too insubstantial* to justify a tax on a business which was otherwise conducted solely through means of interstate commerce." Pet., at 13 (emphasis in original).

The decision in *Nat. Bellas Hess* was based on the understanding that National had no contacts with the taxing state other than through interstate commerce; that was the whole point of the decision. The Court had no occasion to consider whether the seller's local contacts were too indirect or insubstantial to support a use tax collection duty since such contacts, if any, were not in the record before it.

LPI's statement that National "used Illinois banking and credit facilities" refers to a fact *assumed* by the three dissenting justices

C. The applicable constitutional test is satisfied here because of the in-state activities conducted on behalf of Looart Press by Christmas Publishers Group

The facts of this case clearly demonstrate "some definite link, some minimum connection" between LPI and the State of California. The salient facts are as follows:

LPI contracted with a California corporation, Christmas Publishers Group, to represent it (LPI) within the State of California. Under this contract, CPG agreed to promote and sell "Looart" Christmas cards through established retail outlets. It also agreed to imprint customers' names, as requested, on the "Looart" cards sold through CPG. For these services, CPG received commissions ranging from 20 to 50 percent of net sales.

For an additional charge, CPG prepared display albums of personalized cards that were distributed to retail outlets within the state. CPG also maintained an inventory of the "Looart" Christmas cards at its place of business in Concord, California, during the three-to-four-month Christmas season. This inventory included both cards shown in the display albums and solid-pack Christmas cards (i.e., boxed cards which were not personalized). Inventory was used to fill orders within a short period of time. It was insured by LPI, as were all "'Looart" products in transit to or from CPG.

Purchasers of the cards placed their orders with a retail outlet. The orders were sent to CPG, which personalized the cards, if requested. CPG shipped completed orders to the retail outlets,

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(Justices Black, Douglas and Fortas). The dissenters noted that the affidavits upon which the case was tried did not disclose the details of the company's credit operations in Illinois, but they were willing to make certain assumptions that such credit business would lead to local activities. 386 U.S., at 761-762. On the basis of these assumptions, the dissenters concluded that "Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois." *Id.*, at 762. The majority in *Nat. Bellas Hess* was unwilling to make the same assumptions, basing its holding on the statement of fact that "[*a*]*ll* of the contacts which National does have with the State are via the United States mail or common carrier." *Id.*, at 754 (emphasis added).

which then delivered the cards to the ultimate consumers. On a monthly basis, LPI would send CPG its agreed share of the sales proceeds, plus other costs and expenses billed to LPI by CPG.

LPI publicly held itself out as having a "fulfillment center" in California, that center being identified as Christmas Publishers Group by a LPI witness. CPG in fact used stationery bearing the letterhead "Looart, Press, Inc." and the address of CPG's Concord facility.

The sales activity conducted on LPI's behalf by CPG obviously was productive. In the three-and-a-half year period involved, LPI's receipts from orders placed through CPG totaled more than $750,000.

LPI's claim that these activities were too "nominal" to furnish the requisite nexus for use tax collection purposes, see, e.g., Pet., at 30, is plainly without merit. It is instructive, for example, to consider the in-state activities found sufficient to justify a *direct* tax against a foreign corporation in *Standard Steel Co.* v. *Wash. Revenue Dept.*, 419 U.S. 560 (1975). In that case, the State of Washington levied a business and occupation tax on the unapportioned gross receipts which an out-of-state manufacturer received from its sales of aerospace fasteners to Boeing Company. The foreign corporation was represented in the state by one employee who operated only out of his home. This employee had no direct involvement in the sale of the fasteners, his primary duty being to consult with Boeing regarding its anticipated needs and to follow up on any difficulties in the use of the products after delivery. It was claimed that these contacts with the taxing state were too insufficient for nexus purposes. This Court rejected that claim, stating that it "verge[d] on the friviolous." 419 U.S., at 562.

Respondent submits that if the claim of Standard Steel verged on the "friviolous," the claim of LPI verges on the ridiculous. Indeed, LPI makes no serious attempt to weigh its contacts with the State of California against those present in *Standard Steel*. It emphasizes that the foreign corporation in that case enjoyed a valuable benefit from the in-state presence of its employee which "'made possible the realization and continuance of valuable contractual relations. . . .'" Pet., at 23. But that, of course, was

also true of LPI—which, because of the activities of its local representative in California, was able to realize sale proceeds in excess of three quarters of a million dollars.

LPI nevertheless asserts that, despite the activities of its California representative, there was lacking "some definite link, some minimum connection" between LPI and the State of California. Ironically, it relies principally on *National Geographic*, urging that "The distinction between the facts of the instant case and those which this Court emphasized as creating the taxing 'nexus' in *National Geographic* highlights the *non-existence* of a constitutionally permissible taxing 'nexus' in this case." Pet., at 16 (emphasis in original).

LPI first points out that in *National Geographic*, the out-of-state vendor maintained two offices in California. By contrast, it says, LPI has never operated or maintained an office within the state. Assuming this is true,[6] it is irrelevant since LPI was otherwise present in California not only because of its representation by CPG but because of its indirect use of storage facilities at CPG's place of business in the state. There are, of course, numerous cases in which adequate nexus has been found even though the foreign corporation has not occupied an office or other place of business within the taxing state. See, e.g., *General Trading Co.* v. *Tax Comm'n, supra*; *Scripto* v. *Carson, supra*; *Standard Steel Co.* v. *Wash. Revenue Dept., supra*.

LPI further points out that the corporation was represented in California by an independent contractor, which also marketed its own cards and the cards of other manufacturers, unlike the retailer in *National Geographic*, whose two offices were "each staffed by four full-time employees." Pet., at 16.[7] However, the fact that a foreign corporation performs acts in the taxing state

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[6] The contacts which LPI may, or may not, have had with the State of California prior to the commencement of the tax period or after the conclusion of the trial in this action are not a matter of record.

[7] During the tax period at issue in *National Geographic*, each of the offices was staffed by *two* employees. See 16 Cal.3d, at 640, 547 P.2d, at 459. Whether the employees were "full-time" is unknown.

through independent contractors was deemed to be "without constitutional significance" in *Scripto* v. *Carson, supra*, 362 U.S., at 211. This Court explained:

> "The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon his effectiveness in securing a substantial flow of goods into Florida .... To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to tax avoidance .... Moreover, we cannot see from a constitutional standpoint 'that it was important that the agent worked for several principals.' [Citation omitted.] The test is simply the nature and extent of the activities of the appellant in Florida." *Id.*, at 211-212.

LPI also has the curious notion that its obligation to collect use taxes from California purchasers on goods sold under the brand name "Current" has somehow been discharged by the payment of other taxes by other parties having some connection with the "Looart" product line. It notes that the state has received sales taxes on the retail sales of "Looart" products. But the sales taxes paid by retailers of the "Looart" products were imposed on those retailers for the privilege of conducting a retail business in California. *Western Lithograph Co.* v. *State Bd. of Equalization,* 11 Cal. 2d 156, 164 (1938); Cal. Rev. & Tax. Code § 6051. The retailer's payment of such taxes has no bearing on whether LPI, due to *its* being engaged in business in California, can be required to collect the use taxes which California purchasers owed with respect to "Current" products.

Similarly, LPI claims that "CPG paid California taxes, including California income and property taxes, with regard to its business activities, which included the sale of Looart products," and thus California already has received "fair tax revenue" for any benefits it may have conferred on the Looart business. Pet., at 18 (emphasis deleted). These facts, it says, are "diametrically different" from the facts in *National Geographic,* where the Society's revenue producing activities "were ... entirely untaxed, so that the State derived no payment for the direct intrastate benefits conferred upon the corporation." *Id.* (emphasis deleted).

The payment of income and property taxes by CPG is not part of the record in this case, and LPI has not disclosed the source of its inside information on the purported nonpayment of such taxes by the National Geographic Society.[8] In any event, what taxes either of those companies may have paid (or not paid) to the State of California has nothing to do with the use tax collection duty asserted against LPI on its mail order sales. Surely, for example, the National Geographic Society could not have claimed immunity from the use tax collection duty on the ground that California already had levied income taxes on its employees' wages.

LPI also considers significant the relative amount of receipts it derived from its interstate and intrastate sales. It says:

> "Notably, the intrastate business [in *National Geographic*] which constituted the constitutional 'nexus' to justify taxation was *ten times* the mail order revenue upon which the tax was assessed; in the instant case the intrastate business which the State relies upon to justify the tax is *one-tenth* of the interstate business which it seeks to tax." Pet., at 19 (emphasis in original).[9]

The duty to collect the use tax is not based, however, on the "intrastate business" as such, and hence it does not hinge upon

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[8] In the *National Geographic* decision, this Court merely noted that sales of the National Geographic Magazine were exempt from *sales and use taxes* as a "periodical." See 430 U.S., at 553, n.1.

[9] LPI has overlooked the fact that the $83,596 figure for mail order revenue in *National Geographic* pertained to two test periods covering only *two quarters* of 1964, whereas the revenue from the sale of advertising space was approximately $1,000,000 *per year*. See 16 Cal. 3d, at 641, n. 6, 547 P.2d, at 460, n. 6; see also 430 U.S., at 554, n. 3. Thus, if the mail order sales had totaled some $170,000 per year, the amount derived from the sale of advertising space would have been closer to six times the mail order revenue. It appears, however, that the advertising revenue may actually have been less than *two* times the revenue from the mail order sales. During one eight-month period, for example, the mail order receipts were $452,470. See 16 Cal. 3d, at 640, n. 5, 547 P.2d, at 640, n. 5.

the relative amount of receipts derived from intrastate sales. In suggesting otherwise, LPI clearly misconceives the fundamental principle which justifies the imposition of a use tax collection duty on a foreign corporation. That principle is fairly simple: A corporation conducting business within a state necessarily enjoys the services, benefits and protections provided by that state, and in exchange therefor the state is entitled to ask something in return. Whether such a corporation realizes *any* income or profit from intrastate sales is totally beside the point so long as the foreign corporation enjoys the services of the taxing state. This explains why the use tax collection duty requirement has been upheld where there have been no intrastate sales at all. See, e.g., *Felt & Tarrant Co.* v. *Gallagher, supra; General Trading Co.* v. *Tax Comm'n, supra; Scripto* v. *Carson, supra.*[10]

LPI also mentions several other factors which, in its view, may have influenced the Court's decision in *National Geographic.* It states with emphasis that the local offices of the Society "performed services directly related to the publication and sale of the National Geographic Magazine." Pet., at 17 (emphasis deleted). Why LPI views this as so important is unclear, particularly since the asserted use tax collection duty did not pertain to sales of the magazine, but to sales of other tangible personal property. LPI further points out that the magazine contained advertising for the mail order merchandise. *Id.* But clearly this fact was of secondary importance, if significant at all; it was only mentioned in the brief recitation of facts at the beginning of the Court's opinion. LPI also emphasizes that in *National Geographic,* as well as in other cases dealing with the use tax collection duty, the intrastate and

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[10] LPI says that in *National Geographic,* "merchandise advertised in the [Society's] magazine was also available for sale at both California offices, and some retail sales were made." Pet., at 17. However, the sales were confined to a nine-month period (only part of which fell within the two quarters under litigation) and they totaled less than $3,000. Moreover, this Court agreed with the view of the California Supreme Court that since the collection duty could be imposed upon the Society irrespective of any over-the-counter sales, it was unnecessary to consider these sales in determining whether sufficient nexus existed. See 430 U.S., at 554, n. 2.

interstate activities were conducted under a single name. If a court were to accept *that* fact as constitutionally significant, it would not only "open the gates to tax avoidance," *Scripto* v. *Carson, supra,* 362 U.S., at 211, but put out a "WELCOME" mat.

Finally, LPI stresses over and over again that its intrastate activities were unrelated to its mail order sales of "Current" products. This is the subject of the section which follows.

D. The use tax collection duty may be imposed on LPI even though its in-state activities were unrelated to its sales of the "Current" products

In asserting that the requisite nexus was lacking here, LPI has repeatedly emphasized that its activities in California were unrelated to its mail order sales of the "Current" products. However, it is clear from the decision in *National Geographic* v. *Cal. Equalization Board, supra,* that the absence of such a relationship is irrelevant. This Court said:

> "The Society argues . . . that there must exist a nexus or relationship not only between the seller and the taxing state, but also between the activity of the seller sought to be taxed and the seller's activity within the State. *We disagree.*
>
> * * *
>
> " . . . the relevant constitutional test . . . is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax.' " 430 U.S., at 560-561 (brackets and final emphasis in original).

Ignoring this explicit holding of the Court, LPI contends that " . . . in *National Geographic* . . . the interrelationship of the mail order sales with the local sales activity, which in all cases consisted of retail sales of the same products, under the same name, which were made from a branch office of the taxpayer, justified the state's assumption that the mail order business was 'not unrelated to' the local retail activity." Pet., at 22. LPI

obviously has read the *National Geographic* through rose-colored glasses. The isolated retail sales which occurred within the state were not even taken into account by this Court in determining whether adequate nexus was present. See 430 U.S., at 554, n. 2. Furthermore, the Court did not hold that adequate nexus existed because the intrastate activities of the Society were related to its mail order sales, but *in spite of the fact they were not. Id.*, at 560-561.

LPI's description of earlier mail order cases is also inaccurate. It states that in *Nelson* v. *Montgomery Ward*, 312 U.S. 373 (1941), there was a "tangible connection" between the seller's in-state activities and its mail order sales, as evidenced by the fact that the products sold through the mails were the same as those sold under the same name at its local retail outlets. Pet., at 21. This fact, if true, was not mentioned in the Court's opinion.[11] LPI also states that in *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941), the Court "found it necessary to analyze the relationship of the interstate and intrastate business in order to determine whether the State had conferred direct benefits upon Sears' mail order business. . . ." *Id.*, at 20 (emphasis deleted). There is no such analysis contained in the opinion. Furthermore, in its discussion of the *Sears, Roebuck* decision in *National Geographic*, this Court said:

> "It is true that *Sears, Roebuck* . . . involved [a] fact pattern[ ] that included proof of assistance by local operations of the mail order business. Sears' agents in the State, although not directly involved in the solicitation of the mail order sales, at times assisted in processing such orders. *The holding*

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[11] LPI has overstated the distinctions which existed between its two lines of business. It is not as though LPI had two formally organized subdivisions, one of them producing stationery items and the other, light bulbs. There was no radical difference between the economy priced greeting cards and other stationery items sold under the "Current" brand name and the custom-designed greeting cards sold under the "Looart" name. The goods were manufactured at common facilities. In addition, since the "Looart" and "Current" product lines were developed by a husband-and-wife team, it defies common sense to assume that no expertise was shared.

> *that Sears could not avoid use tax liability did not, however, turn on that fact.* The holding rather was that the fact that Sears' business was departmentalized—the mail order and retail stores operations were separately administered—did not preclude the finding of sufficient nexus." 430 U.S., at 560 (emphasis added).

What LPI refuses to recognize is that the crucial nexus or relationship is that between the taxing state and the *person* it seeks to make a tax collector. Where such a nexus is present, an out-of-state seller receives benefits from the taxing state that are in no way diminished by the fact that his local activity may be unrelated to the transactions on which the use tax collection duty is based. As this Court observed in *National Geographic*:

> "... Here the Society's two offices, *without regard to the nature of their activities*, had the advantages of the same municipal services—fire and police protection and the like—as they would have had if their activities ... included assistance to the mail order operations that generated the use taxes." 430 U.S., at 561.

Similarly, in the present case, LPI, both directly and through CPG, had the advantages of the same services that it would have enjoyed had CPG handled "Current" products rather than other products marketed under the "Looart" name.

LPI's final argument is based on the four-prong test set forth in *Complete Auto Transit* v. *Brady*, 430 U.S. 274 (1977). In that case, this Court held that a state tax does not run afoul of the Commerce Clause "when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.*, at 279. LPI claims that the liability asserted against it by the State of California is improper under the fourth prong of the *Complete Auto* test because that liability is not "fairly related" to any services which the state may have provided the company.[12]

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[12] While LPI asserts that the subject liability places an impermissible burden on interstate commerce, see Pet., at 29, it did not raise Com-

The reasoning in support of LPI's argument is that "the only privileges, benefits or protections which California did or could have extended to [LPI] . . . would have been through its connection with CPG," Pet., at 28, and "California has already been fully compensated for any benefits received through its connection with CPG, since it has been paid sales taxes (once Looart products were sold at retail) and income, business and franchise taxes, etc., levied against CPG." Pet., at 27. It also points out that the use tax liability in this case is equal to almost two-thirds of the receipts which LPI derived from its intrastate sales of "Looart" products through CPG.

As previously pointed out, the taxes which other parties may have paid in connection with "Looart" products have nothing to do with the obligation of LPI to collect use taxes on sales of "Current" products. Certainly, the payment of such taxes has not "compensated" the state for services provided to LPI.[13] More fundamentally, however, the *Complete Auto Transit* test is applied to direct taxes based on some aspect of interstate or foreign commerce. The use tax is imposed on the local consumption of goods after interstate commerce has come to an end, *Felt & Tarrant Co.* v. *Gallagher, supra,* 307 U.S., at 67, and the only burden placed upon an out-of-state retailer is the administrative one of collecting it. *National Geographic* v. *Cal. Equalization Board, supra,* 430 U.S., at 558. Furthermore, even in the case of a direct tax, the "fair relationship" requirement does not entail a weighing of the amount of taxes collected against the value of state services provided to the taxpayer or to the taxed activity. See *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 621-626 (holding that fourth prong of *Complete Auto* test requires only that the *measure* of the tax be reasonably related to the contact which furnishes the basis for the tax).

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merce Clause objections in the Court of Appeal and has not included that clause in the recitation of "Constitutional Provisions . . . Involved" in its petition for review.

[13] It is not true that LPI received benefits from the State of California only through CPG. One example of a direct benefit is the fire and police protection afforded to LPI's inventory of goods in California, for which LPI bore the risk of loss.

CONCLUSION

LPI has not offered any legitimate basis for a review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

December 2, 1986

Respectfully submitted,

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(Appendix follows)

Appendix

Court of Appeal of the State of California
In and for the
First Appellate District

Division Four

No. A025677
(Super. Ct. No. 773804)

Looart Press, Inc.,
Plaintiff and Respondent,

vs.

State Board of Equalization,
Defendant and Appellant.

ORDER MODIFYING OPINION
[Filed April 23, 1986]

BY THIS COURT:

It is ordered that the opinion filed herein on April 16, 1986, be modified in the following particular:

On page 7, the first full sentence is deleted and the following sentence is inserted in its place:

> On retrial, the trial court must consider LPI sales from the Current division when setting the tax that LPI owes.[5]

Dated: April 23, 1986

/s/ ANDERSON, P.J.
Anderson, P.J.